Supreme Court U. S.
FILED
MAY 24 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1973 TERM

No. 73 - 1627

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-against-

LEON NEWSOME,

Respondent.

APPLICATION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

TO: THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Leon Newsome, respondent herein, respectfully applies for leave to proceed in forma pauperis in connection with the filing of his brief in opposition to the petition for a writ of certiorari. Respondent's affidavit in support of the within application is annexed hereto.

Dated: May 21, 1974
New York, New York

Respectfully submitted,

STANLEY NEUSTADTER
WILLIAM E. HELLERSTEIN
The Legal Aid Society
119 Fifth Avenue
New York, New York 10003
Counsel for Appellant

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

LEON NEWSOME, being duly sworn, deposes and says:

I am the respondent herein and make this affidavit in support of the within application to proceed in forma pauperis in connection with the filing of the brief in opposition to the petition for a writ of certiorari.

I am without funds to pay the cost of printing my brief in opposition and retaining counsel.

Throughout the prior proceedings in both the courts of New York and in federal court I was allowed to proceed as a poor person and was represented by the Legal Aid Society of New York. Such counsel have agreed to represent me in this Court without expense to me.

Leon Newsome
LEON NEWSOME

Sworn to before me this
22 nd day of May, 1974
Myra K. Wallach

MYRA K. WALLACH
NOTARY PUBLIC, STATE OF NEW YORK
No. 41-5512825
Qualified in Queens County
Term Expires March 30, 1976

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 492 F.2d 1166 and is set forth as Appendix B to the petition; the opinion of the district court has not been officially reported and is set forth as Appendix A to the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a state defendant who duly exhausted state remedies by presenting his constitutional claim in timely accord with statutorily mandated state procedures after his guilty plea has properly preserved his claim for subsequent habeas corpus relief.

2. Whether respondent's arrest and search, under the color of a loitering statute already declared unconstitutional in both state and federal courts because of its vagueness and its authorization of suspicion arrests, violated his right to be free of unreasonable searches and seizures and deprived him of due process of law.

STATUTES INVOLVED

1. NEW YORK CODE OF CRIMINAL PROCEDURE, §813-c (eff. Apr.29,1962) provides, in pertinent part:

> A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property...claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move...for the suppression of its use as evidence
>
> * * *
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.

2. NEW YORK PENAL LAW §240.35(6) provides in pertinent part:

> A person is guilty of loitering when he
>
> * * *
>
> (6) Loiters, remains or wanders in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime, and upon inquiry by a peace officer, refuses to identify himself or fails to give a reasonably credible account of his conduct and purposes;

STATEMENT

Respondent does not take issue with the statement of the case as set forth in the opinion below [492 F.2d at 1168-69].

REASONS FOR DENYING THE WRIT

Petitioner, having conceded throughout that respondent's constitutional claim was fully and properly litigated in timely accord with New York's statutory procedures, asserts that respondent's guilty plea ipso facto "waived" any opportunity for habeas corpus relief otherwise available to claimants who have fully exhausted state remedies [28 U.S.C.§2254].

The weakness of petitioner's argument is highlighted by New York Code of Criminal Procedure §813-c, which explicitly sanctioned judicial review of the order denying respondent's motion to suppress evidence even though the conviction was ultimately predicated upon respondent's subsequently entered plea of guilty.

Respondent, then, exhausted his state remedies in precisely the manner required by §813-c, a statute which, as the court below recognized, represents an "enlightened" legislative determination that "trials are not to be encouraged in order to preserve a ground for appeal [ie, an order denying a motion to suppress evidence] and that guilty pleas in such cases would aid in avoiding additions to beleaguered trial calendars". 492 F.2d at 1170.

We are thus unable to explain why petitioner would have this Court enervate a purely local* statutory effort designed to remedy New York's notoriously congested criminal calendars. Originally enacted in 1962 by a prescient legislature sensitively concerned with expeditious dispositions of criminal matters, section 813-c proved itself so successful along these lines that the legislature saw fit to retain the provision intact [as §710.70(2)] when, in 1971, it enacted an entirely new Criminal Procedure Law which otherwise wrought sweeping changes in many areas of the administration of criminal justice.

* California appears to be the only other jurisdiction which has analogous legislation. See Cal.Pen.Code §1538.5(m) [West,1973].

Indeed, §813-c has earned special commendation as a sound approach to crowded calendars by the A.B.A.'s MINIMUM STANDARDS RELATING TO CRIMINAL APPEALS, §1.3(b)(i) and Commentary thereto [Approved Draft,1970]:

> By so doing, New York avoids the unfortunate situation where the only reason a defendant goes to trial is to save the right to appeal denial of a pretrial motion to suppress evidence. Where the only litigable questions arise before trial, it is wasteful to force a sham trial in order not to have a forfeiture of appellate review.

Undaunted by the existence of New York's creative statute (whose constitutionality petitioner does not contest) and the continuing policy its reenactment reflects, petitioner presses his "waiver" argument which, moreover, ignores the particularly cruel injustice it would work upon the respondent in this case. As noted by the court below,

> "it would be anomalous if [respondent] by scrupulously following a sanctioned and reasonable state procedure for preserving his federal constitutional claims on appeal in state courts simultaneously waived his right to present those same claims to a federal court. . . because he was lulled into following state procedures". 492 F.2d at 1170.

Indeed, the record in this case bears grim witness to how petitioner's automatic "waiver" theory alters an 'enlightened' statutory provision into a trap for the unwary. After the motion to suppress was denied, respondent pleaded guilty to the contraband charge expressly announcing his intention to follow the post-plea procedures of §813-c as the means whereby he would seek to vindicate the constitutional claims he litigated unsuccessfully at the motion to suppress [492 F.2d at 1169].

It is thus rather disingenuous for petitioner to claim (at p.8 of the petition) that the Second Circuit has "sprung a trap on the State of New York". After all, it was the State of New York, not respondent, that enacted §813-c, upon which respondent

and his lawyer explicitly relied as the legitimate and proper method for the vindication of the constitutional claim notwithstanding the plea. Unlike respondent, petitioner does not, and cannot, show how New York relied to its detriment upon §813-c. Nor can petitioner deny the explicit nexus between the existence of 813-c (which he now seeks to disaffirm) and respondent's plea, which petitioner now so conveniently contorts into a "waiver" only after it has been secured.

Petitioner relies heavily upon quotations from various cases of this Court (cited at p.6 of the petition), but none of those cases involved a constitutional claim fully litigated before the plea under state statutory procedures designed to encourage that plea. The plea cases cited by petitioner were founded ultimately upon a requirement of candor and consistency of position between the defendant and the state. In those cases the defendants took the benefits of their guilty pleas (lesser sentences), but deliberately bypassed their opportunities to present their extant federal claims [eg,McMann:coerced confession; Tollett:systematic juror exclusion] to the state courts through the procedures the states had made available for that purpose. Thus it was thought unfair to the state to allow the defendants to do a complete about-face and raise the previously bypassed federal claim in collateral proceedings long after their pleas and sentences had been accepted by the state as final dispositions of their cases.

Here, it is the state that seeks the unfair advantage. By accepting the court-economy benefits that §813-c was designed to, and did, encourage, the state now does an untimely about-face in collateral proceedings, claiming for the first time that "plea-equals-'waiver'" to preclude respondent from litigating his properly preserved constitutional claim. Nothing in this Court's plea cases sanctions the inequitable advantage sought here by petitioner, and the court below was wholly correct in so holding.

Petitioner's assault on the decision below places itself on no firmer footing by positing a 'conflict' with Mann v. Smith, 488 F.2d 245(9th Cir.1973), cert. denied, ___U.S.___, 42 LW 3469(Feb.19,1974). As the Chief Judge accurately noted below [492 F.2d 1171,n.9], the 'conflict' is more apparent than real; for the defendant in Mann, unlike respondent, had not availed himself of California's limited post-plea appellate procedures, a critical distinction which has eluded petitioner.

We also note that when Mr. Mann sought certiorari, he, too, asserted a 'conflict' between the Ninth Circuit and the three extant Second Circuit decisions upon which the result in the instant case is predicated [U.S. ex rel. Rogers v. Warden, 381 F.2d 209(2d Cir.1967); U.S. ex rel. Molloy v. Follette, 391 F.2d 231 (2d Cir.1968); U.S. ex rel. Stephen J.B. v. Shelley, 430 F.2d 215 (2d Cir.1970)]. To whatever minimal extent the Ninth and Second Circuits might be deemed to hold discordant views, their discordance was fully evident to this Court when certiorari was sought, and recently denied, in Mann. We are unable to ascertain, nor has petitioner suggested, how this asserted 'conflict' was exacerbated by the decision below, or why this case is any more worthy of review than Mann.

In sum, prior to seeking habeas corpus relief, respondent properly exhausted his state remedies under the unique statutory procedures which New York has erected to ease its scandalous and equally unique criminal court backlogs. Petitioner was in no way prejudiced---in state or federal court---by those procedures, whose singularity divests this case of any nationwide significance and thus renders it undeserving of further review by this Court.

II.

When the New York Court of Appeals declared the catchall loitering subsection here involved facially unconstitutional [People v. Berck, 32 NY2d 567, cert.denied, 414 U.S. 1093(1973)], whatever controversy that might once have attended the issue was largely dissipated if not altogether eliminated; for the Second Circuit did nothing that had not already been done to the statute by the highest court of the state that enacted it.

Berck, of course, was predicated upon a trio of cases which ruled it unreasonable for a state to punish ostensibly innocent conduct under the rubric of a statute whose language gives inadequate notice that such conduct is unlawful. Papachristou v. Jacksonville, 405 U.S. 156(1972); Smith v. Florida, 405 U.S. 172 (1972); Palmer v. Euclid, 402 U.S. 544(1972).

Thus, the Second Circuit, following the sound lead of the New York Court of Appeals, concluded that the broadness and indefiniteness of the loitering subsection authorized wholly indiscriminate interference with the common public activity of ordinary citizens. Found equally defective was the subsection's attempt to criminalize a citizen's arousal of "suspicion" that he "may be engaged or about to engage in crime".

The court below also noted that statutes which are constitutionally defective for vagueness and overbreadth in the context of punishment can be simultaneously responsible for Fourth Amendment quandaries in the context of arrests effected under their aegis. The loitering subsection here placed respondent in precisely such a quandary, for the imprecision of the statute disabled him from conforming his behavior to its purported mandate and from thereby protecting himself from the police intrusion conducted under its color.

Respondent's arrest, moreover, for a crime whose basic element is "suspiciousness" was perforce an arrest on the basis of information far less probative of criminal involvement than was reasonable under the Fourth Amendment. The decision below stands simply and squarely for this primal tenet of search and seizure law; it hardly represents a novel development worthy of review, particularly when this Court has so recently denied review---also sought by this petitioner---in Berck, supra.

Finally, we note the significant absence from the petition of any assertion that the loitering statute is not vague and overbroad. Indeed, the only theory affirmatively advanced in support of the subsection is that it authorized an arrest of a citizen "who was up to no good" (Petition,p.10)---a legal standard no less vague, and no less violative of the Fourth Amendment, than the very statute it purports to sustain.

CONCLUSION

IT IS THEREFORE RESPECTFULLY SUBMITTED THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
STANLEY NEUSTADTER
Counsel for Respondent

May 20, 1974